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LEGAL UPDATE

WEINHOLD LEGAL

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BILLS UNDER DISCUSSION

AMENDMENT OF THE ACT ON THE PROTECTION OF ECONOMIC COMPETITION

In February 2012, the chairman of the Office for the Protection of Economic Competition (the "Office") submitted a bill amending Act No. 143/2001 Coll. on the protection of economic competition and the changing of some laws, as amended (the "bill"), to the Chamber of Deputies via the Prime Minister.

The Economic Competition Protection Act is designed to prevent the exclusion, restriction, distortion or threatening of economic competition on the market for goods and services, which may occur in three instances anticipated by the law: (i) agreements between undertakings, (ii) abuse of dominant position by undertakings and (iii) concentration of undertakings. Hence, the "leniency program" [in Czech: *program shovívavosti*] for cartel agreements, which serves as an essential tool in the detection of secret cartel agreements. Under the leniency program, a party to a cartel agreement can achieve a remission or reduction of impending penalties by providing the Office with information leading to the identification and break-up of a cartel.

A leniency program of sorts does currently exist. Nonetheless, the rules of this so-called "soft law" first adopted by the Office in 2001 are not legally binding.

The bill's primary aim is to legislate the leniency program conditions and, in so doing, to strengthen legal certainty for applicants for a remission or reduction of impending penalties and ensure the program's effective use and operation.

The bill defines the conditions for:

1. full penalty remission, which requires that an undertaking initiate contact with the Office and admit to its participation in an agreement. The undertaking is further obliged to actively work with the Office during the ensuing proceeding and to exert no pressure on other parties to the cartel. Information provided to the Office by an undertaking in connection with the identification of a prohibited cartel may comprise information not previously known to the Office or information helping to prove the existence of a cartel;

2. penalty reduction, which requires that the applicant submit documentation and information that has significant added value for the Office in its investigation to identify a prohibited cartel.

The bill also modifies the Office's authorisation to "prioritise" its investigation of cases of potential violation of the Act according to established criteria (i.e. to prioritise the investigation of cases with more serious and far-ranging implications), and not devote time and energy to marginal cases of violation that have been a longstanding drain on Office resources.

As an anti-corruption tool, the bill introduces the option of imposing a ban on the performance of public contracts and concession agreements on entities that have committed the administrative offense of executing a cartel agreement in the process of bidding on public contracts or in connection with a concessions procedure.

The bill is currently under Senate discussion and should enter into effect on the first day of the second calendar month following the date of its promulgation in the Czech Collection of Laws.

INSOLVENCY ACT AMENDMENT

On 15 August 2012, the Senate returned a bill amending Act No. 182/2006 Coll. on insolvency and methods of its resolution, as amended (the "Insolvency Act"), to the Chamber of Deputies with minor technical motions to amend. The bill responds to the practice rampant among some creditors of attempting to eliminate a competitor by filing a petition to initiate an insolvency proceeding or of circumventing standard legal proceedings over contentious claims by initiating an insolvency proceeding.

The current Insolvency Act offers just one protection against "deceptive creditor petitions" in the form of § 147, a provision enabling the claiming of compensation for damage caused to a debtor or another of its creditors from a petitioner in cases where an insolvency petition is rejected or refused on grounds for which the petitioner is culpable. The bill extends the deadline for exercising this right from three to six months and stipulates the substantive jurisdiction of regional courts to hear such matters.

A key point of the submitted bill is its introduction of the added possibility of rejecting an insolvency petition for "apparent lack of cause", enabling the courts to reject such petition not only for formal defects, but also for reasons of substance, within a time-limit of seven days of the filing of an insolvency petition. Naturally, such reasons would have to be apparent to the court from the petition itself, as the brief time-limit means the court cannot count on receiving an opinion from the debtor. As examples of apparent lack of cause, the new provision presents a case in which the petitioner bases a petition on a claim that is not taken into account for the purposes of the bankruptcy decision, the case of a re-filed insolvency petition in which the petitioner has failed to substantiate its performance of an obligation imposed in an earlier decision and a case where an insolvency petitioner has plainly set out to abuse its rights at the debtor's expense by filing a petition.

A petitioner with intent to deceive should also be discouraged by a new disciplinary fine of up to CZK 50,000 that a court may impose at the time of its refusal of an insolvency petition for apparent lack of cause.

Another significant change is the proposed insolvency court option of limiting some effects associated with the initiation of an insolvency proceeding in a preliminary injunction in the period prior to the insolvency petition ruling. For reasons of special consideration and assuming compliance with the creditors' common interests, it will be possible with court approval to perform execution or enforce a decision on the debtor's property or to exercise the right to satisfaction from collateral tied to the debtor's property.

At the debtor's request, the court will now be able to require in a preliminary injunction that the insolvency petitioner (with the exception of a debtor employee) deposit a security to cover compensation of damage or other detriment incurred as a result of the baseless initiation of an insolvency proceeding or of measures adopted in the course of such proceeding.

BILL ON JOINT STOCK COMPANY TRANSPARENCY

On 18 June 2012, the government submitted a bill designed to regulate the conditions for the mandatory changing of certificated bearer shares that are not immobilised (transferred to the collective custody of, inter alia, a securities trader) to certificated registered shares, and the associated duties of joint stock companies as well as certain rights and obligations of other persons. The bill's objective is to ensure shareholder traceability and improve the position of the Czech Republic in the fight against organised crime.

The drafting of the bill reflected the fact that the new Business Corporations Act will enter into force on 1 January 2014 and no longer allow the existence of certificated bearer shares. The procedure anticipated by the bill is as follows.

At 1 January 2014, certificated bearer shares that are not immobilised will change to certificated registered shares and a corresponding change shall, by law, be made to the company articles. No commercial register entry is required for the change to be effective; the Board of Directors shall make the company articles legally compliant and file a petition to enter the change by 30 June 2014.

Shareholders will then present their shares to the company to be exchanged or marked with the necessary information by 30 June 2014. If they are in delay, they may not exercise the rights attached to these shares; nor will they be entitled to any dividends, if a decision on the appropriation of profit is made while they are in delay. The Board of Directors decides whether the shares will be exchanged or only marked with the change. A company shall publish a call to submit shares in the manner specified for the convening of a General Meeting at least 3 months prior to the deadline (i.e. by 31 March 2014). If shares are held by a pledgee or other authorised individual, then he/she shall submit the shares to be exchanged; shareholders are liable for damage incurred by failure to perform this obligation.

If a decision was taken to issue certificated bearer shares before the Act's entry into force and they have not yet been issued, the prior legislation shall apply. If a shareholder transfers shares whose form has changed by law, the shareholder shall mark his/her name and other identifying information on these shares.

A related Commercial Code change is the new company duty to record a bank account number in the list of shareholders owning certificated registered shares – all monetary compensation arising from participation in the company shall be remitted to this account. The account must be held in an OECD, EU or EEA country.